

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CAROLYN J. HARRIS

Claimant

VS.

WICHITA CLINIC, P.A.

Respondent

AND

EMPLOYERS MUTUAL CASUALTY COMPANY &

HARTFORD CASUALTY INSURANCE COMPANY

Insurance Carriers

Docket No. 1,021,774

ORDER

Respondent and its insurance carrier Hartford Casualty Insurance Company appeal the May 3, 2005 preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes. Claimant was awarded benefits after the Administrative Law Judge (ALJ) determined that claimant had suffered an accidental injury arising out of and in the course of her employment with respondent and had provided timely notice of that accident. Claimant was awarded temporary total disability compensation and temporary partial disability compensation along with medical expenses and medical treatment with George G. Flutter, M.D., as the authorized treating physician.

Respondent contends that claimant did not suffer accidental injury arising out of and in the course of her employment. Or, in the alternative, claimant suffered an intervening aggravation of her ongoing condition in employment which occurred after claimant's termination of employment with respondent. Respondent further contends that claimant did not provide timely notice of accident and that the date of accident in this matter was incorrectly determined by the ALJ.

ISSUES

1. Did claimant suffer accidental injury arising out of and in the course of her employment through a series of accidents culminating on September 28, 2004?

2. Did claimant provide timely notice of accident?
3. What is the appropriate date of accident?
4. Did the ALJ exceed her jurisdiction in ordering temporary total disability compensation and temporary partial disability compensation?
5. Has claimant suffered an intervening accidental injury in her current employment which would relieve respondent of the responsibility of providing workers compensation benefits in this instance?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the Administrative Law Judge should be affirmed in part and dismissed in part.

Claimant alleges a series of accidental injuries culminating on her last day worked through September 28, 2004. Claimant, a phlebotomist for respondent, began experiencing problems in her upper extremities, including hand numbness, in late 2003 and into early 2004. Claimant initially sought treatment with her family practitioner, Patrick J. Lomasney, M.D., from Hutchinson, Kansas. Dr. Lomasney referred claimant to a doctor at the Hutchinson Clinic to schedule surgery. Claimant discussed the problem with her supervisor, Donna Watson, advising that she thought it was workers compensation related, but Ms. Watson denied it. Claimant submitted this matter to her personal health care provider, which would not authorize the utilization of the Hutchinson Clinic. Claimant then transferred her treatment to the Wichita Clinic, where she came under the care of John D. Osland, M.D. Claimant described difficulties with her hands, including numbness, and the difficulties she had doing her job. Claimant underwent carpal tunnel surgery to her left wrist on March 22, 2004, and to her right wrist on March 29, 2004. Approximately the first of April, claimant returned to work, performing the same job she had performed for respondent. Claimant testified that the surgery substantially improved the numbness in her hands. However, the return to her regular job caused her condition to worsen to the point where it hurt at approximately the same level as before the surgery.

Claimant testified that she complained on several occasions to various supervisors including Ms. Watson; Ann Wyland, the overall lab supervisor; Carla Jones, her new supervisor (whom she advised she was looking for a new job due to the problems with her

hands); and Linda Burnside, the lab director.¹ The supervisors all denied the claim, and claimant was advised to file for FMLA leave. Claimant testified that on September 28, 2004, she stuck herself with a needle. Claimant blamed the needle stick on the difficulties she had using her hands in her job.

Claimant terminated her employment at that time, after a last meeting with respondent representatives. Claimant did not advise them at the time of her termination that the termination was related to her work-related injuries, but did discuss the needle stick situation. Claimant remained unemployed until approximately October 12, 2004, at which time she obtained a job with Kwik Shop. Claimant had applied for the Kwik Shop job prior to her termination with respondent and had undergone a pre-employment drug screening. Claimant had earlier advised Ms. Jones that she was looking for a new job due to the problems associated with her hands.

Claimant obtained medical care with Dr. Osland on September 28, 2004. On October 6, 2004, claimant saw Dr. Osland and Dr. Osland's physicians assistant. Claimant was referred to George G. Flutter, M.D., of Advanced Anesthesia Associates and Pain Management, on April 11, 2005, by claimant's attorney. Dr. Flutter, after performing an examination, diagnosed claimant with status post left and right carpal tunnel surgeries and bilateral volar wrist tendonitis. He found within a reasonable degree of medical probability that there was a causal relationship between claimant's condition and her work-related activities. He specifically mentioned the activities performed as a phlebotomist, which he believed contributed to the development of symptomatic median nerve entrapment at the wrist. He provided specific restrictions, which claimant testified she was able to meet even while working the Kwik Shop job.

Respondent argues that claimant did not prove that she suffered accidental injury arising out of and in the course of her employment, that she failed to provide timely notice and that claimant is suffering ongoing aggravation of her condition with the Kwik Shop job.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.² It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust

¹ Ms. Watson was claimant's supervisor at the time claimant first reported her injury. Ms. Watson resigned right after claimant had her surgery. (See P.H. Trans. at 12 & 18.) Ms. Jones, who was hired after Ms. Watson resigned, was claimant's new supervisor. Ms. Jones stopped being claimant's supervisor in May of 2004. (See P.H. Trans. at 18 & 41.) Then claimant's next supervisor was Ms. Wyland. (See P.H. Trans. at 19.) Ms. Watson and Ms. Jones were the phlebotomist supervisors and Ms. Wyland was the overall lab supervisor. (See P.H. Trans. at 20.)

² K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

the medical testimony along with the testimony of the claimant and any other testimony which may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.³

In order for a claimant to collect workers compensation benefits under the Kansas Workers Compensation Act, she must suffer an injury which arises out of and in the course of her employment.

The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment.⁴

The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service.⁵

The evidence in this matter is primarily based upon claimant's testimony, which is, for the most part, uncontradicted regarding how the injury occurred. The medical reports, particularly those of Dr. Flutter, indicate that claimant's work as a phlebotomist led to the problems associated with her upper extremities. The Board finds that claimant has proven that she suffered accidental injury arising out of and in the course of her employment with respondent.

The dispute regarding the appropriate date of accident in this matter is a dispute between two insurance companies. Once the Board has determined that claimant has proven accidental injury arising out of and in the course of employment, the issue dealing with the date of accident and the dispute between the two insurance companies is not an issue over which the Board takes jurisdiction from a preliminary hearing order. The Board has held in the past that date of accident disputes between insurance carriers considering which one of them is to pay the cost of ordered preliminary benefits are not jurisdictional issues.⁶

³ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

⁴ *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

⁵ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984).

⁶ *Ireland v. Ireland Court Reporting*, Nos. 176,441 and 234,974, 1999 WL 123220 (Kan. WCAB Feb. 22, 1999).

The Board, therefore, does not take jurisdiction over the ALJ's determination regarding the appropriate date of accident in this matter. Respondent's appeal of that issue is dismissed.

Likewise, claimant's entitlement to temporary total disability compensation and temporary partial disability compensation are not issues over which the Board takes jurisdiction on appeal from a preliminary hearing. The Board's jurisdiction is limited by K.S.A. 44-534a and K.S.A. 2004 Supp. 44-551 to specific jurisdictional issues. Those jurisdictional issues, which are listed in K.S.A. 44-534a, include whether the employee suffered an accidental injury, whether the injury arose out of and in the course of employment, whether timely notice and timely written claim of the accidental injury were provided and whether there are any defenses which go to the compensability of the claim.⁷ Additionally, the Board may review those preliminary hearing orders where a judge has exceeded his or her jurisdiction or authority in awarding benefits.⁸

An administrative law judge under K.S.A. 44-534a is empowered to award temporary benefits to a claimant in a workers compensation situation. The Board will not take jurisdiction over the awarding of those benefits for the purposes of this appeal. Respondent's appeal of these issues is dismissed.

Respondent argues that claimant is suffering an ongoing aggravation of her condition with her employment at Kwik Shop. This intervening injury, if proven, could relieve respondent from the responsibility of providing ongoing benefits to claimant. However, in this instance, claimant testified that her condition worsened through her last day worked with respondent, although the surgeries did provide her temporary relief. After leaving respondent and going to work for Kwik Shop, claimant testified her condition improved or, at the very least, did not worsen. Claimant testified at the time of preliminary hearing that her condition had improved during the six months leading up to the preliminary hearing.⁹ The Board finds based upon this record that claimant has not suffered an intervening injury during her employment with the Kwik Shop. Claimant's injuries appear to stem from her employment with respondent. This determination is based both upon the testimony of claimant and the opinion provided by Dr. Fluter in his April 11, 2005 report.¹⁰

⁷ K.S.A. 44-534a(a)(2).

⁸ K.S.A. 2004 Supp. 44-551.

⁹ P.H. Trans. at 42.

¹⁰ P.H. Trans., Cl. Ex. 2.

Finally, respondent argues that claimant failed to provide timely notice of accident. K.S.A. 44-520 requires notice of accident be provided to a respondent within 10 days of the accident. The time period can be extended to 75 days from the date of accident if just cause is proven for failure to provide the original notice within 10 days. In this instance, claimant testified that she discussed her ongoing problems and the fact that they were related to employment with several of her supervisors, including Donna Watson (her immediate supervisor), Ann Wyland (the overall lab supervisor), Carla Jones (her new supervisor) and Linda Burnside (the lab director). Claimant testified that she discussed her problems and the fact that they were related to her employment or, at the very least, were workers compensation related on several occasions and that the respondent representatives repeatedly denied the claim. None of respondent witnesses testified in this matter and, therefore, claimant's testimony regarding these conversations is uncontradicted. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.¹¹ The Board finds that claimant provided timely notice of accident within 10 days, as required by K.S.A. 44-520.

The Board, therefore, finds that the Order of Administrative Law Judge Nelsonna Potts Barnes dated May 3, 2005, should be affirmed in all regards.

Preliminary hearings are not binding in a full hearing upon the claim but are subject to a full presentation of the facts.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated May 3, 2005, should be, and is hereby, affirmed, with respondent's appeal regarding the date of accident and claimant's entitlement to temporary total disability and temporary partial disability being dismissed.

IT IS SO ORDERED.

Dated this ____ day of July 2005.

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Patricia A. Wohlford, Attorney for Respondent and its Insurance Carrier (Hartford)

¹¹ *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

P. Kelly Donley, Attorney for Respondent and its Insurance Carrier (Employers Mutual)

Nelsonna Potts Barnes, Administrative Law Judge

Paula S. Greathouse, Workers Compensation Director